UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEFAN GOMES and PARIS MINOR,	)	
Plaintiffs	)	
v.	)	Civil No. 02-147-B-S
TRUSTEES and PRESIDENT of the UNIVERSITY OF MAINE,	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES[1]

The defendants, the University of Maine, Trustees of the University of Maine System, President Peter S. Hoff, Assistant Professor Elizabeth J. Allan, and Director of Judicial Affairs David Fiacco, move the Court for an award of reasonable attorney's fees against Stefan Gomes and Paris Minor (Gomes and Minor), two former university students and football players who sued them for alleged civil rights violations. (Defs.' Mot. for Award of Att'y Fees, Docket No. 69.) The defendants seek to recover $48,133.50 of approximately $57,500.00 in fees charged to the University by their counsel. (Id. at 7-8; Aff. of Paul W. Chaiken, Esq., Docket No. 70, ¶ 16.) According to the defendants, "The taxpayers of Maine who ultimately bear the cost of such groundless litigation were unfairly embroiled in this costly affair, only to have the Plaintiffs pull

[1] Whether the determination of a motion for attorney fees by a magistrate judge falls within 28 U.S.C.A. § 636(b)(3) (providing that a magistrate judge may be assigned additional duties [non pretrial] not inconsistent with the Constitution and the laws of the United States) presents a question upon which much ink might be expended. See generally, Robinson v. Eng, 148 F.R.D. 635 (D. Neb. 1993) (discussing magistrate judge's authority to determine attorney fees in the context of 42 U.S.C. § 1983 litigation when defendants posture motion as a Rule 11 sanction based upon the frivolous nature of the underlying lawsuit). I am satisfied that in the present case the better alternative is to make my findings in a recommended decision subject to de novo review, a process that clearly comports with the United States Constitution.

the plug when confronted with the inevitable." (Id. at 4.) The "inevitable," as they see it, was that all of the defendants would ultimately prevail over the plaintiffs, Gomes and Minor. As it turned out, that eventuality never came to pass, because Gomes and Minor moved to voluntarily dismiss their lawsuit, without costs and without prejudice, which motion was granted by the Court. I now recommend that the Court **DENY** the defendants' motion for attorney fees because the defendants were not the "prevailing party" within the meaning of 42 U.S.C. § 1988.

Facts

Due to the unusual procedural history of this case, this Court has never resolved any factual disputes or had occasion to assess the content of the record in a formalistic fashion, such as it might have in the context of the defendants' summary judgment motion, which was never ruled on. As a consequence, it is not clear what record the Court ought to consider when attempting to state the facts of the case or how those facts ought to be construed. I have drawn the following statement of facts from the plaintiffs' primary factual allegations and from those supportive facts that would appear to be beyond material dispute.

Plaintiffs Stefan Gomes and Paris Minor were enrolled as students at the University of Maine during the summer of 2002 and at the beginning of the fall 2002 semester. During this time they were members of the University's football team. On or about June 10, 2002, Gomes and Minor engaged in one or more sexual acts with a female university student (hereinafter "the Complainant") at the Complainant's off-campus apartment. According to Gomes and Minor, the Complainant consented to these acts. According to the Complainant, her participation was non-consensual. The Complainant reported the incident to police and also filed a complaint with David Fiacco, the University's Director of Judicial Affairs. Although the District Attorney never

pressed criminal charges against Gomes and Minor, Fiacco determined that the charges warranted referral to the University's Student Conduct Code Committee.

In preparation for the hearing, Fiacco prepared a binder of documentary evidence for the Committee's review. Documentary evidence considered by the Committee appears to have been limited to only those items Fiacco supplied in the hearing binder. Although in his possession, Fiacco omitted from the binder certain police investigative reports that were based on interviews police conducted of the Complainant shortly after as well as within days of the incident. The Old Town Police had supplied these reports to Fiacco, but not to Gomes and Minor, who obtained them subsequently from the District Attorney's Office.[2] Based on a written statement that the Complainant submitted to the Committee at the hearing, it is apparent that the Complainant considered the police reports to be "grossly" inaccurate in certain material respects. This remark in her written statement apparently did nothing to pique the Committee's interest in the contents of the police reports, though it was not lost on Gomes and Minor or their counsel.

A review of the police reports and the Complainant's written statement essentially reflects the following: that the Complainant has consistently asserted that she verbally objected to having intercourse with Gomes, but that the Complainant did not physically resist Gomes at that time or thereafter. There is no indication in either the Complainant's written statement or in the police reports that she ever objected to engaging in sexual intercourse with Minor, who was her "boyfriend," although she does assert that she objected to Gomes's participation and that Minor pressured her to go along with it.

Mr. Fiacco also included in the evidence binder a letter written by a friend of the Complainant, which can only be described as relating positive character evidence concerning the

[2] It is unclear why Gomes and Minor did not yet have a copy of the police reports three months after the alleged incident.

Complainant and negative character evidence concerning Minor. There is no specific mention of Gomes. Among other assertions in the letter is one that described the Complainant as a woman who would never "partake in anything of the sort," presumably meaning sex with simultaneous partners. Although Mr. Fiacco included this item of evidence in the binder, Mr. Fiacco withheld from the binder a contradictory statement in his possession that had been provided by another individual, a third member of the football team, which related that he and a fourth member of the team had had three-way sex with the Complainant sometime in March 2002. It appears that Fiacco excluded this evidence from the binder based on the University's adoption of a "rape shield" protocol patterned after Maine Rule of Evidence 412, which generally serves to exclude "reputation or opinion evidence of past sexual behavior of the alleged victim." In other words, Fiacco's actions gave the appearance that he selectively applied the Rule to the prejudice of Gomes and Minor. What role Dr. Allan may have played in the selection or exclusion of this evidence, if any, cannot be determined from the record.

During the September 24, 2003 hearing, a partition was erected between the Complainant and Gomes and Minor. Following an objection by their counsel, Gomes and Minor and their counsel were asked to leave the room. They complied and waited for a period of time in another room, while something transpired in the hearing room. Thereafter, Fiacco came into the room in which Gomes and Minor and their counsel were waiting and asked whether Gomes and Minor would waive their right to confront the Complainant. They refused to do so. Thereafter, the hearing was rejoined and when called to testify to the Committee, the Complainant was situated within view of Gomes and Minor, but with her back turned to them so that she could give her testimony without having to face the men she was accusing of sexual assault.

In addition to these concerns, Gomes and Minor complain that they challenged Dr. Allan's qualifications to serve as a neutral and impartial arbiter prior to their hearing. In fact, they indicated that they wished to voir dire those Committee members who would preside at the hearing, in order to determine whether any might hold a prejudice against football players. In a letter denying the voir dire request, Dr. Allan indicated that "Committee members have been instructed to tell the Chairperson [i.e., Dr. Allan] if they are unable to judge the case fairly and solely on the evidence presented." In other words, potential Committee members are expected to recuse themselves if they are unable to serve as impartial factfinders. Gomes and Minor now complain that Dr. Allan was herself a biased Committee member and should have recused herself from presiding at the hearing because she is an author of such articles as *Hazing, Masculinity and Collision Sports: (Un)Becoming Heroes*, and is a board member of Rape Response Services of Penobscot & Piscataquis Counties, which asserts on its website:

> If someone you know confides in you that he or she has been sexually assaulted, the most important thing for you to do is to believe that person. Offer your support through listening. Judging someone is victim blaming.

Finally, Gomes and Minor question whether the Student Conduct Code was fairly applied because the alleged conduct occurred off campus. The Code's jurisdictional provision indicates that the Code is to be applied "only" with respect to conduct occurring on University property, "at activities pursued under the auspices of the University" or:

> in which the University can demonstrate a clear and distinct interest as an academic institution regardless of where the conduct occurs and which seriously threatens (a) any educational process or legitimate function of the University or (b) the health or safety of any member of the academic community.

Although the defendants would undoubtedly argue that the alleged conduct threatened the Complainant's health and safety, it is unknown at this time whether this provision was

selectively enforced in this instance, perhaps due to the highly-politicized nature of the sexual assault allegations.

The day following the hearing, Gomes and Minor received notice in a letter from Dr. Allan: (1) that the Committee concluded that Gomes and Minor had committed sexual assault in violation of the Student Conduct Code; (2) that Gomes and Minor were suspended from the University through May 31, 2003; and (3) that they could not petition for readmission until August 1, 2003. On the following day, Gomes and Minor filed a complaint in this Court alleging civil rights violations and premising their civil rights claims on 42 U.S.C. §§ 1981, 1983 and 1985. Gomes and Minor alleged that the proceedings deprived them of their constitutional rights to due process of law and equal protection. Their equal protection claim asserted racial bias. Gomes and Minor are African Americans.

In conjunction with the filing of their complaint, Gomes and Minor petitioned the Court for a temporary restraining order (TRO). As cause for a TRO, Gomes and Minor related that their suspension resulted in serious adverse consequences for them, including the loss of food and housing privileges, which had been provided to them for free in connection with their participation on the University football team. The Court summarily denied the petition the following day in a hand-penned notation indicating that the plaintiffs failed to demonstrate a likelihood of success on the merits of their claims.

In due course, on November 7, 2002, the defendants submitted their answer and simultaneously filed a motion to dismiss all claims except for the due process claim. The Court assigned the case to the standard track and set a discovery deadline of March 21, 2003, thereafter extended to May 16, 2003. On December 19, 2002, the Court issued a Report of a conference with counsel concerning discovery matters. As of that date, the defendants had not significantly

responded to the plaintiffs' document requests and the Court advised defendants' counsel that the defendants must stop actively avoiding discovery. Twelve days later and roughly five months ahead of the discovery deadline, the defendants filed a motion for partial summary judgment, before giving the plaintiffs any opportunity to obtain claim-related discovery.[3]

The defendants' summary judgment motion sought an entry of judgment in favor of the individual defendants based on the doctrine of qualified immunity and assumed, solely for the purpose of argument, that a due process violation had occurred. The plaintiffs filed an opposition that complied with Local Rule 56(c), but which was filed three days late, evidently due to a mistaken belief that an extra three days were available by operation of Federal Rule 6. The plaintiffs did not submit a formal motion pursuant to Federal Rule 56(f) asking the Court to either decline to consider the summary judgment motion or continue it until such time as the plaintiffs might have discovery. Thereafter the defendants filed a motion to strike the untimely filings and the plaintiffs moved to voluntarily dismiss their case without prejudice and without costs. The Court granted the plaintiffs' motion to voluntarily dismiss the case. The defendants did not interpose any objection to the motion.

Fifty-nine days after the entry of the order granting the plaintiffs' voluntary motion to dismiss, the defendants filed three motions. With the first motion, the defendants sought an award of a "reasonable attorney's fee" pursuant to 42 U.S.C. § 1988, based on their belief that they qualify as the prevailing party in this case. With the second motion, however, the defendants requested that the Court not actually consider the motion for attorney's fees at all, "unless plaintiffs initiate a new lawsuit against any of the defendants." With the third motion, the defendants sought to seal their entire "submission" on the attorney's fee issue until such time

[3] For example, the defendants' summary judgment statement of facts was supported entirely by Fiacco's and Dr. Allan's affidavits, but the plaintiffs had not been given an opportunity to conduct their depositions.

as it might be necessary to consider the motion. The plaintiffs opposed all three motions and requested oral argument. The Court granted their request for oral argument on the fees application and denied the defendants' ancillary motions to continue the attorney's fees matter and to seal the matter from public view.

The defendants' fee application does nothing to differentiate among the defendants for purposes of billing, reflecting instead that legal services provided to the entire group of defendants was, as might be expected, billed in a lump sum to the University. In addition to claim-related litigation services, the invoices and the request for fees describe roughly 13 hours of time spent on press-related issues, such as preparation for a media interview and drafting an editorial for submission to a regional newspaper.

On July 15, 2003, during the pendency of the instant motion, the plaintiffs filed a new action against the defendants, asserting the same due process-civil rights claims and others. On August 4, 2003, the defendants moved to dismiss that action in its entirety based, in part, on theories not raised in their motion to dismiss this action. The plaintiffs' response deadline is August 25, 2003.

Discussion

Defendants seek an award of attorney fees pursuant to 42 U.S.C. § 1988(b), asserting that they were the prevailing party in plaintiffs' voluntarily-dismissed civil rights action. Section 1988 authorizes the court, in its discretion, to award a reasonable attorney's fee to the "prevailing party." This language invites an award for either a prevailing plaintiff or a prevailing defendant, Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos, 38 F.3d 615, 618 (1st Cir. 1994), although the title of § 1988, "proceedings in vindication of civil rights," makes it somewhat less than intuitive that a defendant might qualify, considering that no civil rights are "vindicated" in such a

circumstance. Courts have recognized the irony in this by significantly raising the bar for prevailing defendants to recover fees:

> In civil rights cases, fee-shifting in favor of a prevailing plaintiff is the rule, whereas fee-shifting in favor of a prevailing defendant is the exception. Thus, though a prevailing plaintiff is presumptively entitled to fee-shifting in such a case, a prevailing defendant is entitled to similar largesse only if she can establish that the plaintiffs' suit was totally unfounded, frivolous, or otherwise unreasonable.

Id.[4] In addition to the considerable hurdle of showing frivolity, Defendants are also faced with an even more fundamental obstacle: the Supreme Court has defined the concept of "prevailing" to mean that a party has secured a court-ordered, material alteration of the parties' legal relationship. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 604 (2001) (concerning fee shifting provisions of the Americans with Disabilities Act and the Fair Housing Act Amendments). I first address whether the defendants qualify under this standard as prevailing parties and then address whether they have sufficiently demonstrated that the plaintiffs' lawsuit was frivolous.

With regard to whether they qualify as prevailing parties within the meaning of § 1988, the defendants rely exclusively on the Court's denial of the plaintiffs' attempt to obtain a TRO that would have enabled the plaintiffs to remain at the University and on the football team. The defendants argue that they qualify as prevailing parties because the plaintiffs' TRO application was summarily denied by the Court, with an endorsement indicating that the plaintiffs had not, at that time, demonstrated a likelihood of success on the merits. At oral argument, the defendants' counsel posited that the circumstances of this case are the "perfect mirror image" of the

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[4] See also Bercovitch v. Baldwin Sch., Inc., 191 F.3d 8, 10-11 (1st Cir. 1999) ("A successful defendant is in a different posture than a successful plaintiff. A successful plaintiff vindicates an important congressional policy and is awarded fees 'against a violator of [federal] law.' Neither is true of a successful defendant. As we noted in a case under Title VII and § 1988, decisions to grant defendants their fees are, and should be, rare.") (quotation marks and citations omitted).

circumstances in Me. Sch. Admin. Dist. No. 35 v. R., 321 F.3d 9, 16 (1st Cir. 2003), a case in which the nominal defendants obtained an award of attorney's fees based on the plaintiff's failure to succeed on a TRO, and in which the plaintiffs voluntarily dismissed their suit shortly thereafter. But this surface similarity is misleading. The M.S.A.D. 35 case was an Individuals with Disabilities Education Act (IDEA) case that addressed "whether parents who successfully resist a school district's effort, in an independent legal action, to overturn a stay-put placement . . . are considered prevailing parties within the purview of the IDEA's fee-shifting provision." Id. at 11. It is readily apparent that the M.S.A.D. 35 case was, in the Circuit Court's words, "not cut from the usual cloth." Id. at 15. Most fundamentally, the IDEA's fee-shifting provision affords relief to prevailing parties only if they are prevailing "parents" and regardless of their status as either plaintiffs or defendants. 20 U.S.C. § 1415(i)(3)(B). Thus, it was of no consequence that the parents in M.S.A.D. 35 happened to be defendants as opposed to plaintiffs, whereas in the usual fee-shifting case, if the applicant for fees is a defendant, a substantial additional hurdle is imposed: the defendant must show that the plaintiff's cause was frivolous. Casa Marie Hogar Geriatrico, Inc., 38 F.3d at 618. There is no indication in M.S.A.D. 35 that the Circuit Court even made an inquiry into whether or not the plaintiff school district's TRO motion was frivolous. In addition, the Circuit Court makes it plain that its opinion turned on the fact that the acquisition of a TRO was the "sole object—the raison d'etre" of the plaintiff's action. M.S.A.D. 35, 321 F.3d at 15. Thus, the Court reasoned, "It follows inexorably that a defendant who prevails on the only claim that justifies the presence of the case in a federal court has a legitimate basis for asserting that she is the prevailing party." Id. at 16. Finally, the Court was moved significantly by the fact that the particular statutory relief the school district was seeking, see 20 U.S.C. § 1415(k)(2), generated a lawsuit devoted to a single evidentiary issue on

which it lost on the merits: whether the defendant-parents' child posed so great a threat to himself and others that he must be moved out of his current educational placement. M.S.A.D. 35, 321 F.3d at 16. In contrast, in the instant case the Court's determination of Gomes's and Minor's TRO application did nothing to conclusively resolve any factual disputes, much less the entire case. The Court only offered a preliminary assessment that the hand the plaintiffs were showing at that time was unlikely to take the pot. Of course, there is an even more fundamental obstacle that prevents the defendants from qualifying as the prevailing party in this litigation: they never obtained an order from this Court that served to materially alter their legal relationship with the plaintiffs. Buckhannon, 532 U.S. at 604.

Regardless of whether the defendants regard themselves as the "winners" of this litigation, they did not "prevail" within the meaning of § 1988. Even M.S.A.D. 35 tells us that "interlocutory orders that serve merely to maintain the status quo usually are deemed insufficient to buoy a fee award." M.S.A.D. 35, 321 F.3d at 15. There being no exceptional circumstances of the kind presented in M.S.A.D. 35, I conclude that the defendants in this matter do not qualify as the prevailing party in this lawsuit.

In the alternative, even if it were possible to characterize the defendants as a prevailing party pursuant to § 1988, there would be no justification for characterizing the defendants' lawsuit as frivolous or groundless.[5] According to the defendants, a finding of frivolousness or groundlessness might be based on the fact that their "very early dispositive motions on nearly every count" were "likely soon to be granted," but for the dismissal. Contrary to the defendants'

[5] Defendants argued at oral argument that the proper terminology is "groundless," citing the legislative history of § 1988. They also suggested that groundless would be an easier standard for them to meet because groundless is not as bad as frivolous. I fail to see how application of a groundless standard would serve to lessen the defendants' burden and observe that the Court of Appeals has not differentiated between the two terms. Casa Marie Hogar Geriatrico, Inc., 38 F.3d at 618.

assertion that their motion to dismiss would have been granted in full, I do not think the answer is so obvious, given the nature of the legal arguments raised in that motion. Their primary argument against the equal protection claim was based on pre-Swierkiewicz,[6] Court of Appeals precedent that imposed a heightened pleading standard on discrimination claims. Prior to the date of the defendants' motion, this Court had more than once rejected such a motion, ruling that Swierkiewicz undid the heightened pleading standard previously imposed in civil rights cases. Greenier v. Pace, Local No. 1188, 201 F. Supp. 2d 172, 176-77 (D. Me. 2002); see also Goodman v. President & Trs. of Bowdoin College, 135 F. Supp. 2d 40 (2001) (pre-Swierkiewicz decision by Judge Carter that came to same conclusion based on Supreme Court's Leatherman opinion).[7] In addition, it cannot be overlooked that the defendants did not even seek a dismissal with respect to the plaintiffs' due process claim. Is the Court seriously to conclude that the plaintiffs' lawsuit was frivolous, when the defendants did not even challenge the primary claim in their motion to dismiss? And as for the defendants' summary judgment motion, the defendants' argument turned exclusively on the qualified immunity doctrine. In their principal summary judgment memorandum, the defendants admitted, albeit for purposes of argument only,

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[6] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002).

[7] Defendants moved to dismiss the equal protection, race discrimination count for failure to allege specific, non-conclusory facts from which motive might be found or inferred, relying on First Circuit equal protection precedent, citing Judge v. City of Lowell, 160 F.3d 67, 72 (1st Cir. 1998) ("[T]his circuit and others have held that in civil rights cases such as the present, a bare conclusory allegation of the critical element of illegal intent, including of an intent to discriminate, is insufficient."). Plaintiffs rejoined that notice pleading is the new standard following Swierkiewicz. The First Circuit Court of Appeals has not yet had an opportunity to determine the impact of Swierkiewicz on Judge, though two judges in this District have concluded that a heightened pleading standard is no longer appropriate. See Greenier, 201 F. Supp. 2d 172; Goodman, 135 F. Supp. 2d 40. Thus, even if defendants are correct that the bulk of their motion to dismiss would have been granted (those arguments directed toward the state law claims), the fact remains that the due process count would have survived because it was not the subject of the motion and the equal protection count, at best, was a toss-up. The defendants want me to consider the fact that the plaintiffs have now abandoned this race discrimination claim in the second lawsuit as somehow bearing upon the frivolous nature of the first lawsuit. I find it more appropriate to consider the legal arguments that were before the court at the time this lawsuit was pending.

that some of the conduct in question may have violated the plaintiffs' due process rights.[8] Is the Court to conclude that the plaintiffs' lawsuit was frivolous, when the defendants resorted exclusively to the doctrine of qualified immunity and never even attempted to argue that the constitutionality of their conduct was obvious? I conclude that the answer to the foregoing questions is "no."[9]

Alternatively, the defendants argue that I might conclude the plaintiffs' claims were frivolous because the Court so quickly denied the plaintiffs' request for a TRO. But as stated previously, the Court's preliminary assessment of the likelihood of the plaintiffs meeting with success did not amount to a finding on the merits of the claims themselves. Moreover, there is a

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[8] In the defendants' own words:

> Although the first step in the qualified immunity analysis is to determine whether a plaintiff can make out a constitutional violation, Defendants, for purposes of the qualified immunity analysis, do not argue this point. Instead, assuming *arguendo* Plaintiffs can make out a due process violation, Defendants are entitled to qualified immunity because Plaintiff cannot show a violation of a clearly established constitutional right.

(Defs.' Mot. Partial Summ. J. Based on Qual. Immunity, Docket No. 36, at 6.) I recognize that as a practical matter once the individual defendants achieved a summary judgment in their favor on the issue of qualified immunity, a judgment against the University of Maine and the President in his official capacity, the sole remaining defendants, might have been legally unobtainable for a host of different reasons. The legal strategy adopted by the defendants to achieve their ultimate success in this litigation may well have been a sound one. However, the very fact that they chose to employ the qualified immunity analysis demonstrates to me that plaintiffs' complaint presented at least a colorable claim. While it may be true that a defendant is entitled to qualified immunity because a particular right has not yet been clearly established, the Supreme Court has made it clear that federal courts have the obligation in the first instance of determining whether there has been any constitutional violation before undertaking the qualified immunity analysis regarding whether the right is "clearly established." Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [state actor's] conduct violated a constitutional right?"); Suboh v. Dist. Attorney's Office of Suffolk Dist., 298 F.3d 81, 90 (1st Cir. 2002) ("The threshold inquiry is whether the plaintiff's allegations, if true, establish a constitutional violation.").

[9] The defendants also observe that the plaintiffs' filings in opposition to the motion for summary judgment were tardy. Even assuming that there was not "excusable neglect" for plaintiff counsel's late filing, any technical victory that might have arisen from that fact would not bear on the question of whether the lawsuit was frivolous from its inception. Finally, the defendants suggested during oral argument that the Court might assess the merits of the plaintiffs' lawsuit from the separate perspective of each individual defendant, noting that the plaintiffs' claim against President Hoff individually seemed by far the most attenuated. I do not disagree with that evaluation, but I decline to engage in this kind of assessment. The defendants' motion for fees reflects a unified approach to billing, which reflects defense counsel's understandably unified approach to defending this case. In other words, there is no indication anywhere that the claims against President Hoff did anything to enhance defense counsel's bill.

certain Gestalten problem with the defendants' argument. In the big picture, plaintiffs were, in effect, found to be rapists at the conclusion of a proceeding that involved, for lack of a better term, certain procedural "miscues." In my view, even if these miscues did not violate the plaintiffs' civil rights, a reasonable person in the position of the plaintiffs might yet believe that the proceedings were unfair at a very basic level. Add to this the highly-politicized nature of the case and the very significant consequences that the Committee's ruling had for Gomes and Minor, not only in terms of room and board, but also in terms of their academic and athletics pursuits and public reputations, it would be inappropriate, in my view, to think that they should not have been able to find an attorney to pursue their cause through litigation. This is by no means to condone this particular piece of litigation; it is simply to say that, all things being considered, the underlying facts were sufficiently irregular to take this case out of the frivolous category, even if it is, ultimately, of questionable legal merit.[10]

Conclusion

For the foregoing reasons, I recommend the defendants' Motion for Award of Attorneys' Fees, Docket No. 69, be **DENIED**.

[10] The defendants suggested at oral argument that the Court might await the outcome of the pending motion to dismiss all claims in the newly-filed lawsuit before deciding the question of whether the first lawsuit was frivolous. I do not consider that to be an appropriate approach. The new lawsuit had not been filed at the time the defendants' motion for fees was filed. Rather, this lawsuit had already been dismissed without prejudice and without costs and no action was pending. At the time plaintiffs moved to voluntarily dismiss their complaint without prejudice and without costs, the defendants never endeavored to challenge the plaintiffs' motion to dismiss the case. If the defendants believe they are entitled to fees in connection with the new lawsuit, they can file the appropriate motion and establish that the reinstitution of the lawsuit was frivolous or otherwise groundless, if they are, in fact, the prevailing party in the new litigation.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

August 22, 2003

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

STANDARD, CLOSED

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00147-GZS
Internal Use Only

GOMES, et al v. UNIVERSITY OF ME TRU, et al
Assigned to: Judge GEORGE Z. SINGAL
Referred to:
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1981 Civil Rights

Date Filed: 09/26/02
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Movant
